UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JAMES LAGASSIE,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 95-69-B***
	)	
SHIRLEY S. CHATER,	***)***	
Commissioner of Social Security,[1]	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[2]

This Social Security Supplemental Security Income and Social Security Disability appeal raises the single issue of whether substantial evidence in the record supports the Commissioner's determination that the plaintiff is able to return to his past work as a materials handler in the roofing

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[1] Donna E. Shalala, Secretary of Health and Human Services, was originally named as the defendant in this matter. On March 31, 1995 the Social Security Administration ceased to be part of the Department of Health and Human Services and became an independent executive branch agency. *See* Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, 108 Stat. 1464, §§ 101, 110(a). Concerning suits pending as of that date against officers of the Department of Health and Human Services, sued in an official capacity, Congress has authorized the substitution of parties as necessary to give effect to the change. Such substitution is so ordered here and I will therefore refer to all determinations made by the Social Security Administration in this case as those of the Commissioner.

[2] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The Commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 26, which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on July 19, 1995 pursuant to Local Rule 26(b) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, cause authority and page references to the administrative record.

industry, and thus that the plaintiff is not under a disability. The plaintiff contends that the administrative law judge improperly failed to credit his testimony about his recurrent dizziness, alcoholism, reduced attention span and diminished ability to concentrate. The plaintiff also contends that the administrative law judge improperly failed to take into account his borderline intellectual functioning. I recommend that the court vacate the decision of the Commissioner and remand for further proceedings.

In accordance with the Commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff has not engaged in substantial gainful activity since December 15, 1992, Finding 2, Record p. 18; that he has a borderline intellectual capacity, but does not have an impairment or combination of impairments that meets or is equal to any listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Finding 3, Record p. 18; that his statements about the impact of his impairments on his ability to perform work are not entirely credible, Finding 4, Record p. 18; that he lacks the residual functional capacity to perform tasks requiring normal intelligence, Finding 5, Record p. 19; that his impairment does not prevent him from performing his past relevant work as a materials handler in the roofing industry, Findings 6, 8, Record p. 19; and that he was therefore not under a disability at any time through the date of the administrative law judge's decision, Finding 9, Record p. 19. The Appeals Council declined to review the decision, Record pp. 4-5, making it the final determination of the Commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F. 2d 622, 623 (1st Cir. 1989).

The standard of review of the Commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Lizotte v. Secretary of Health & Human Servs.*, 654 F. 2d 127, 128 (1st Cir. 1981). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs*., 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge's determination that the plaintiff could return to his past relevant work occurred at Step 4 of the sequential evaluation process. At Step 4, the burden is on the plaintiff to show that he cannot perform his past relevant work. *Goodermote*, 690 F.2d at 7; 20 C.F.R. §§ 404.1520(e), 614.920(e). In considering the issue, the Commissioner must make a finding of the plaintiff's residual functional capacity, a finding of the physical and mental demands of past work and a finding as to whether the plaintiff's residual functional capacity would permit performance of that work. 20 C.F.R. § § 1520(e), 416.920(e); Social Security Ruling 82-62, reprinted in *West's Social Security Reporting Service*, at 813 (1983).

The plaintiff challenges the adequacy of the findings made pursuant to Ruling 82-62 in light of what he characterizes as record evidence that he suffers from dizziness precluding him from working at the heights required of a materials handler in the roofing industry. The plaintiff also points to what he characterizes as uncontroverted medical evidence as to his declining concentration and attention span, contending that the administrative law judge should have taken these limitations into account in the assessment of his residual functional capacity.

At oral argument, the plaintiff made clear what seems implicit from his written statement of errors: He does not contend that the dizziness itself is a medically significant impairment, but rather

a sign or symptom of his alcoholism. This presents the court with a threshold problem not raised by the plaintiff in his statement of errors nor discussed by the parties at oral argument. The administrative law judge did not make a finding at Step 2 of the sequential evaluation process that the plaintiff's alcoholism is a medically severe impairment. He explicitly confined his Step 2 finding to "borderline intellectual capacity," Finding 3, Record p. 18; elsewhere, he found that "the claimant is not more than slightly impaired by a substance addiction disorder." Record p. 15.

The Supreme Court has explicitly upheld the authority of the Social Security Administration to deny benefits to claimants based on a failure to make the threshold showing of a severe and medically determinable impairment. *Bowen v. Yuckert*, 482 U.S. 137, 145 (1987). However, the Step 2 requirement is a *de minimis* one, *i.e.*, Step 2 does "no `more than allow the [Commissioner] to deny benefits summarily to those applicants with impairments of a minimal nature which could never prevent a person from working.'" *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1125 (1st Cir. 1986) (quoting *Baeder v. Heckler*, 768 F.2d 547 (3d Cir. 1985)); *see also Yuckert*, 482 U.S. at 154 n.12 (noting *McDonald*-type circuit court holdings). It seems to me unassailably implicit in the plaintiff's Step 4 argument, *i.e.*, that his alcoholism prevents the performance of his past relevant work, that the administrative law judge erred in not finding that his alcoholism was a medically significant impairment.

I am in agreement with the plaintiff's implicit assertion of error at Step 2. "`Great care should be exercised in applying the not severe impairment concept.'" *McDonald*, 795 F.2d at 1125 (quoting Social Security Ruling 85-28). The administrative law judge noted that the plaintiff has twice received inpatient treatment for alcoholism and that dizziness is both a symptom of alcohol use and a factor that could be vocationally significant. Record pp. 14, 15. In finding that the alcoholism was

not medically severe, the administrative law judge relied on Exhibit 21 of the administrative record. *Id*. at 15. According to the administrative law judge, this exhibit includes a denial by the plaintiff that his drinking has had a significant impact on his work, and discloses that the plaintiff was laid off from his last job, "implying that alcohol was not a factor in the lay off." *Id*. Exhibit 21, which appears in the Record at pages 121-32, is comprised of medical records from the plaintiff's 1993 hospitalization for alcohol abuse. I have thoroughly reviewed Exhibit 21 and find none of the assertions referenced by the administrative law judge. What I *do* find in Exhibit 21 is an unambiguous and unqualified medical diagnosis of "alcohol abuse and dependency." *Id*. at 121. If Step 2 truly is a *de minimis* threshold, the plaintiff has submitted more than enough evidence to get past it.[3]

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[3] At oral argument, the plaintiff sought for the first time to challenge the lack of a finding at Step 3 that his alcoholism does not meet Listing 12.09 (substance addiction disorders). Since findings favorable to the plaintiff at Step 4 do not depend on favorable findings at Step 3, I cannot infer from the Step 4 contentions raised in the plaintiff's statement of errors that he also challenges the lack of a finding that his alcoholism meets listing severity.

It is a firmly rooted canon of appellate practice that an issue raised for the first time at oral argument will be deemed to have been waived except in extraordinary circumstances. *Piazza v. Aponte Roque*, 909 F.2d 35, 37 (1st Cir. 1990). In restating the waiver principle in *Piazza*, the First Circuit relied upon the language in Fed. R. App. P. 28(a) stating that the brief of an appellant "*shall* contain" a statement of the issues presented for review and related contentions of the appellant. *Id*. (emphasis in original). "This requirement informs the appellee of the scope of the appeal and enables him or her to prepare briefs and arguments accordingly." *Id*. Similarly, the local rule of this court applicable to Social Security disability appeals provides that "counsel for the plaintiff *shall* file with the Court an itemized statement of the specific errors upon which the Plaintiff seeks reversal of the [Commissioner's] decision." Loc. R. 26(b)(1) (emphasis added). This requirement informs the Commissioner of the scope of the appeal and enables her to prepare for oral argument or, if appropriate, to seek a remand. A plaintiff who asserts errors at Step 4 in his written submissions may not suddenly raise Step 3 issues at oral argument.

Were the plaintiff's Step 3 argument not waived, the inadequacy of the administrative law judge's Step 3 analysis would require a remand. Alcoholism is a "mental disorder" for purposes of the Listings. *See* Listing 12.00 (placing Listing 12.09, "substance addiction disorders," among the other mental disorders in the Listings). In evaluating mental impairments at Step 3, the administrative law judge must follow a specific set of evaluative steps and complete a standard

(continued...)

The administrative law judge had considerable evidence before him in making his Step 4 determination. The record includes the written report of David W. Booth, Ph.D., a clinical psychologist who evaluated the plaintiff in October 1993. Dr. Booth took note of the plaintiff's statement that he "found himself becoming increasingly anxious on roofs" and that the plaintiff "frequently felt dizzy." *Id.* at 115. Noting the plaintiff's consumption of a 12-pack of beer daily, *id*., Dr. Booth determined that the dizziness "could be related to his alcohol use and . . . would contribute to the difficulty which [the plaintiff] may experience persisting with work requirements," *id*. at 118. Dr. Booth also found that "to the extent that [the plaintiff] consumed alcohol in association with work requirements, it is likely that he would experience difficulty concentrating and persisting with whatever might be assigned to him." *Id.* The plaintiff's testimony at hearing was corroborative of Dr. Booth's report. *See id. at* 30, 35 (dizziness on the job); 32, 37 (daily consumption of alcohol). The plaintiff testified that his dizziness is not confined to heights, and that he is "dizzy every day." *Id*. at 39.

The plaintiff spent ten days at the Acadia Hospital and Eastern Maine Medical Center in October 1993 for treatment of alcohol abuse and dependency. *Id*. at 121-24. His treating physician there, Thornton W. Merriam, Jr., M.D., reported that an electroencephalogram performed during the hospital stay did not reveal any abnormalities. *Id*. at 122. In December 1993, Ronald S. Jolda, D.O., evaluated the plaintiff and diagnosed alcoholism, indicating that the dizziness "could possibly be due

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[3](...continued)
document (the Psychiatric Review Technique ("PRT") form) that tracks those steps. 20 C.F.R. §§ 404.1520a, 416.920a. Although the administrative law judge completed a PRT form in connection with Listing 12.05 (mental retardation and autism), he did not do so in connection with the plaintiff's asserted substance addiction disorder. This was obviously a deliberate choice by the administrative law judge, in light of his determination at Step 2 that the alcoholism was not a medically significant impairment.

to cardiac arrhythmia" and "[m]ay warrant some investigation." *Id*. at 133, 136. Dr. Jolda reported "no restrictions in terms of sitting, standing, walking, lifting, carrying, bending, handling objects, hearing, speaking and traveling [sic]." *Id.*

The administrative law judge took note of this evidence, *id*. at 15, concluding:

> There is no objective evidence that the claimant suffers from dizziness. Even if his allegations of dizzy spells are accepted, there is no reason to think they would not be successfully treated with medication if related to the heart or by control of his drinking if a symptom of inebriation. . . . Of all the limitations alleged by the claimant, only borderline intellectual functioning has any objective support in the record.

Id. at 17.

The Commissioner's regulations provide the following advice to claimants:

> If you have a condition diagnosed as addiction to alcohol or drugs, this will not, by itself, be a basis for determining whether you are, or are not, disabled. As with any other medical condition, we will decide whether you are disabled based on symptoms, signs, and laboratory findings.

20 C.F.R. §§ 404.1525(e), 416.925(e). In *Arroyo v. Secretary of Health & Human Servs*., 932 F.2d 82 (1st Cir. 1991), the First Circuit discussed the manner in which the Commissioner should apply this principle at Step 4. *Id*. at 87. "[A] claimant who seeks disability benefits on grounds of alcoholism must prove that he is addicted to alcohol and has lost the ability to control his drinking. In addition, the claimant must show that his alcoholism precludes him from engaging in substantial gainful activity." *Id*. (citations omitted). The court held that

> alcoholism can constitute a compensable disability under this test. But we emphasize that even though alcoholism, by definition, imports a certain lack of control, evidence that a claimant has been diagnosed a chronic alcoholic is *not* sufficient to establish that the claimant has lost the ability to control his consumption of alcohol. This inquiry requires that [the adjudicator] determine whether claimant has so far lost the capacity for self control that he has been "rendered impotent to seek and use means of rehabilitation."

Id. (citations omitted).

In the instant case, there is uncontroverted medical evidence that the plaintiff suffers from alcoholism. What is lacking is any factfinding by the Commissioner concerning the plaintiff's ability to control his alcohol consumption, as required by *Arroyo*. The administrative law judge simply dismissed the dizziness issue by noting a lack of objective evidence, by which I can only assume the judge meant a lack of medical evidence pinpointing an organic cause of the symptom other than alcohol abuse, and observed that the dizziness would go away if only the plaintiff stopped drinking. The latter point is self-evidently valid as a simple matter of cause and effect, as is the notion that a man who drinks 12 beers a day and is dizzy during working hours will be unable to work on a roof. Thus, the problem with the Commissioner's decision is not precisely as the plaintiff frames it in his statement of errors -- an asserted failure to recognize that evidence of his dizziness is uncontroverted and a dizzy person cannot be a roofer -- but rather lies in the failure of the Commissioner to consider whether the plaintiff is able to control his substance abuse.[4]

At oral argument, the Commissioner took the position that no remand is required in light of *Santiago v. Secretary of Health & Human Servs*., 944 F.2d 1 (1st Cir. 1991). In *Santiago*, the First Circuit interpreted Ruling 82-62 as imposing a significant requirement on a claimant at Step 4:

> [T]he claimant has the burden of making some reasonable threshold showing that [he] cannot return to [his] former employment because of [his] alleged disability. To do so, claimant must initially produce relevant evidence of the physical and mental demands of [his] prior work. . . . If, assuming the existence of the limitations as [he] describes them, [he] nonetheless appears to still possess the ability to do that past

[4] The same reasoning applies to the plaintiff's contention that the administrative law judge failed to consider Dr. Booth's findings that he has difficulties with concentration and persistence. Dr. Booth made clear his view that these problems were the symptoms of alcohol abuse. *See* Record p. 118 ("to the extent that [the plaintiff] consumed alcohol in association with work requirements, it is likely that he would experience difficulty concentrating and persisting with whatever might be assigned to him").

> work, [he] is obviously not disabled. In short, not only must the claimant lay the foundation as to what [his] former work entailed, but [he] must point out (unless obvious) -- so as to put in issue -- how [his] functional incapacity renders [him] unable to perform [his] former usual work.

Id. at 5 (citations omitted). As to his alcoholism-induced dizziness, I cannot agree with the Commissioner that the plaintiff has failed to carry the burden described in *Santiago*. A claimant may meet his initial burden as to the demands of his prior work through testimony, or the evidence may "take the form of historical or subjective statements made in the application or other documents provided by the agency" as long as the claimant "furnish[es] some minimal information about the activities that [his] past usual work required, including those which can no longer be performed." *Id*. Here, as the Commissioner pointed out at oral argument, the plaintiff offered no testimony as to the demands of his former work. However, in the Disability Report the plaintiff submitted on August 26, 1993 he offered this description of his work responsibilities: "I used shovels, axes, hammers etc. I replaced old roofs." Record p. 82. Terse though it may be, that description provided the Commissioner with the minimum information necessary to evaluate the plaintiff's contention that he cannot return to his former work. And as to the question of whether the plaintiff has adequately put in issue how his functional incapacity makes him unable to perform his former usual work, it suffices to say that this is is one of those obvious cases posited in *Santiago*. A person in a state of alcohol-induced dizziness lacks the capacity to work on roofs, much less to wield any tools in such a precarious place.

As to the next issue raised by the plaintiff, however, I do find the Commissioner's reliance on *Santiago* to be persuasive. The plaintiff's contention is that the administrative law judge's findings made pursuant to Ruling 82-62 are flawed in light of uncontroverted evidence of his

borderline intellectual functioning.[5] According to the plaintiff, the administrative law judge should have made specific findings concerning the extent to which his intellectual functioning limits his functional capacity.

The plaintiff testified to an inability to read or to write. Record pp. 28-29. Psychological testing conducted in October 1993 revealed a verbal IQ of 72, a performance IQ of 76 and a full scale IQ of 73. *Id*. at 116. The administrative law judge found that the plaintiff is not able to perform tasks requiring normal intelligence, *id*. at 17, Finding 5; Record p. 19, but that this impairment did not preclude performance of his past relevant work, Finding 7, Record p. 19.

This is a fully appropriate result in light of *Santiago*. Unlike the alcoholism-related impairments described above, the plaintiff's intellectual limitations do not so obviously preclude him from returning to the work he described in his disability report that no further showing by him on that point is required. And the plaintiff has not come forward with evidence of how his intellectual capacity prevents him from performing his previous tasks as a roofing materials handler. The administrative law judge's sparse findings on this point are thus attributable not to any error on his part, but to the plaintiff's failure to provide an evidentiary basis for detailed factual findings to the effect that his intellectual limitations significantly limit his residual functional capacity.

Because the Commissioner has not adequately determined the extent to which the plaintiff's alcoholism prevents the performance of his past relevant work, I recommend that the Commissioner's decision be **VACATED** and the cause **REMANDED** for proceedings consistent herewith.

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[5] The plaintiff does not challenge the lack of a finding at Step 3 that his intellectual impairments meet or equal any of the Listings.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 27th day of July, 1995.

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David M. Cohen
United States Magistrate Judge